WISCONSIN LEGISLATIVE COUNCIL
INFORMATION MEMORANDUM

U.S. Supreme Court Case on Campaign Finance:
Citizens United v. Federal Election Commission

On January 21, 2010, the U.S. Supreme Court released its decision in *Citizens United v. Federal Election Commission*, 558 U.S. __, 175 L. Ed. 2d 753 (2010), which held that government may not prohibit corporations from using their general treasury funds to make independent expenditures,[1] overturning *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990) and, in part, *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003). However, the Court held that government may impose disclosure and disclaimer requirements on corporate political speech.

BACKGROUND

Prior to the decision in this case, a corporation could not use funds from its general treasury to make an independent expenditure that is an "electioneering communication" or that expressly advocates a candidate's election or defeat. An "electioneering communication" is a broadcast, satellite, or cable communication that "refers to a clearly identified candidate for Federal office;" is made within 60 days before a general election or 30 days before a primary election; and targets the relevant electorate. [2 U.S.C. s. 434 (f) (3) (A) (i).]

The U.S. Supreme Court upheld as facially constitutional the limitation on the funding of "electioneering communications" by corporations in *McConnell v. Federal Election Commission (FEC)*, 540 U.S. 93 (2003).[2] Later, in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), the U.S. Supreme Court held the limitation on the funding of "electioneering communications" unconstitutional as applied to specific communications, but the Court stopped short of overturning its decision in *McConnell*.[3]

[1] Although the Court did not directly address the implications of its decision on independent expenditures funded from a labor union's general treasury, it could be argued that the Court, in effect, also held that government may not prohibit labor unions from using their general treasury funds to make independent expenditures.

[2] For more information on *McConnell*, see "U.S. Supreme Court Case on Campaign Finance: *McConnell v. FEC*," Wisconsin Legislative Council, LM-2003-6, December 19, 2003.

[3] For more information on *Wisconsin Right to Life*, see "U.S. Supreme Court Case on Campaign Finance: *Federal Election Commission v. Wisconsin Right to Life*," Wisconsin Legislative Council, IM-2007-04, August 24, 2007.

In addition, in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), the U.S. Supreme Court upheld as constitutional a state law that prohibited a corporation from using funds from its general treasury for independent expenditures that support or oppose a candidate.

In 2008, Citizens United released a documentary about Hillary Clinton, who, at the time, was a candidate for President. Citizens United sought to make the documentary available free of charge through video-on-demand and produced advertisements to run on television for the documentary. The advertisements contained a statement about Clinton, along with the name of the documentary. Concerned that the documentary and the advertisements might be considered "electioneering communications" and thus prohibited by federal law, Citizens United sued the FEC. Citizens United argued that the prohibition on "electioneering communications" and the disclosure and disclaimer requirements were unconstitutional.

The U.S. Supreme Court first considered whether Citizens United's claim could be resolved on grounds other than reconsidering *Austin*. The Court found that the documentary was an "electioneering communication" and was "the functional equivalent of express advocacy." [175 L. Ed. 2d at 773.] In addition, the Court refused to make the prohibition on corporate-funded "electioneering communications" inapplicable to video-on-demand movies and refused to provide an exception to the prohibition for expenditures of certain nonprofit corporations. Consequently, the Court stated that it could not "resolve [the] case on a narrower ground without chilling political speech" and decided to reconsider *Austin*. [175 L. Ed. 2d at 775.]

PROHIBITION ON CORPORATE-FUNDED EXPENDITURES

The Court stated that the political speech of corporations is protected by the First Amendment to the U.S. Constitution.[4] The Court found that the prohibition on corporate-funded independent expenditures is a ban on speech, despite a corporation's ability to create a political action committee to fund independent expenditures.

According to the Court, a law that burdens political speech must withstand strict scrutiny in order to be permissible under the First Amendment. Strict scrutiny requires that the government demonstrate that the law furthers a compelling government interest and that the law is narrowly tailored to attain that compelling interest.

The government argued that the prohibition on corporate-funded independent expenditures furthers several compelling interests.

First, the government argued that the prohibition on corporate-funded independent expenditures furthers a compelling interest in preventing distortion. In *Austin*, the Court accepted the antidistortion interest, noting that the government has a compelling interest in preventing "'the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the

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[4] In discussing the applicability of First Amendment protections to corporations, the Court noted that *Austin* was the first case to address the constitutionality of a prohibition on corporate-funded independent expenditures. In *Austin*, the Court upheld the prohibition by finding a compelling interest in preventing distortion. The Court also noted that pre-*Austin* cases forbid limitations on a corporation's political speech based on its status as a corporation.

public's support for the corporation's political ideas.'" [175 L. Ed. 2d at 787, citing *Austin*, 494 U.S. at 660.] In *Citizens United*, the Court, concerned about the effect of the antidistortion interest on the government's ability to determine the source from which an individual receives his or her information, rejected the antidistortion interest.

Second, the government argued that the prohibition on corporate-funded independent expenditures furthers a compelling interest in preventing corruption. The Court noted that *Buckley v. Valeo*, 424 U.S. 1 (1976), did not extend the anticorruption interest to expenditures and that the anticorruption interest, in *Buckley*, was restricted to *quid pro quo* corruption. In *Citizens United*, the Court found that independent expenditures "do not give rise to corruption or the appearance of corruption." [175 L. Ed. 2d at 794.] Therefore, the Court rejected the anticorruption interest.

Third, the government argued that the prohibition on corporate-funded independent expenditures furthers a compelling interest in protecting dissenting shareholders. The Court found that the prohibition was overinclusive and underinclusive with respect to achieving protection of shareholders in that the prohibition covers corporations that have only one shareholder and in that the prohibition applies only within 60 days before a general election and 30 days before a primary election. Consequently, the Court rejected the shareholder-protection interest.

Fourth, the government argued that the prohibition on corporate-funded independent expenditures furthers a compelling interest in preventing the influence of foreign associations and individuals. The Court, noting that the prohibition is not limited to foreign associations or corporations, rejected the interest in preventing the influence of foreign associations and individuals.

Because the Court rejected the government's assertions of compelling interests, the prohibition on corporate-funded independent expenditures failed to satisfy the strict scrutiny test. Thus, the Court overruled *Austin* and, in part, *McConnell* and held that a corporation's independent political speech may not be suppressed. The Court further held unconstitutional the prohibition on corporate-funded independent expenditures.

DISCLOSURE AND DISCLAIMER REQUIREMENTS

The Court then addressed the constitutionality of the disclosure and disclaimer requirements under federal law as they would apply to the documentary and the advertisements.

According to the Court, disclosure and disclaimer requirements must withstand exacting scrutiny in order to be permissible under the First Amendment. Exacting scrutiny "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." [175 L. Ed. 2d at 799, citing *Buckley*, 424 U.S. at 64, 66.]

The Court discussed the governmental interest, namely the interest in informing the electorate about sources of campaign spending, that was used to justify disclosure requirements in *Buckley*. The Court found the informational interest to be a sufficient governmental interest for the disclosure and disclaimer requirements. However, the Court noted that an as-applied challenge to disclosure requirements may be available upon a showing that disclosure may subject contributors to harassment or threats.

In addition, the Court noted that "disclosure is a less restrictive alternative to more comprehensive regulations of speech." [175 L. Ed. 2d at 801.] The Court rejected the arguments of Citizens United that the disclaimer requirement is underinclusive in not requiring disclaimers for certain advertising and that disclosure requirements may only apply to "speech that is the functional equivalent of express advocacy." [*Id.*]

Thus, the Court upheld as constitutional the application of disclosure and disclaimer requirements to Citizens United's documentary and advertisements.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

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